

Chapter 5

Foreign Relations

A. EXECUTIVE–LEGISLATIVE SEPARATION OF POWERS

On June 1, 2009, the Department of Justice’s Office of Legal Counsel (“OLC”) issued a memorandum concluding that § 7054 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Div. H, Pub. L. No. 111–8, 123 Stat. 524) “unconstitutionally infringes on the President’s authority to conduct the Nation’s diplomacy, and the State Department may disregard it.” The State Department requested the opinion concerning § 7054, which provides:

None of the funds made available under title I of this Act may be used to pay expenses for any United States delegation to any specialized agency, body, or commission of the United Nations if such commission is chaired or presided over by a country, the government of which the Secretary of State has determined, for purposes of section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2405(j)(1)), supports international terrorism.

Title I provides the sole funding for the State Department’s delegations to specialized U.N. agencies. The Secretary of State has designated Cuba, Iran, Sudan, and Syria as state sponsors of terrorism under § 6(j)(1) of the Export Administration Act (“EAA”).^{*} Excerpts follow

^{*} Editor’s note: The opinion explained that the EAA’s termination on August 20, 2001, did not change its analysis. The opinion stated:

. . . Since the EAA terminated, the President, acting under the authority of the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. §§ 1701–1706 (2000 & West Supp. 2008), has annually issued executive orders that adopt the provisions of the EAA and that continue Executive Branch actions taken initially under the authority of the EAA. . . . Congress has ratified this practice. . . . In light of this history, we believe that Congress intended the reference in section 7054 to determinations “for purposes of 6(j)(1) of the [EAA]” to encompass, at a minimum, determinations that the Secretary made prior to EAA’s termination but which retain their force as a result of the President’s exercise of his authority under IEEPA.

from the OLC opinion, which is available in full at www.justice.gov/olc/2009/section7054.pdf (most footnotes omitted).

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In signing the Omnibus Act, President Obama issued the following statement:

Certain provisions of the bill, in titles I and IV of Division B, title IV of Division E, and title VII of Division H, would unduly interfere with my constitutional authority in the area of foreign affairs by effectively directing the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments. I will not treat these provisions as limiting my ability to negotiate and enter into agreements with foreign nations.

Daily Comp. Pres. Doc. No. 2009-00145 (Mar. 11, 2009) (President Obama’s Statement on Signing the Omnibus Appropriations Act, 2009). Section 7054 is within title VII of division H, and purports to “effectively direct[] the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments.” Thus, although the President’s signing statement did not identify section 7054 specifically, it encompasses that provision.

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III.

In our view, section 7054 impermissibly interferes with the President’s authority to manage the Nation’s foreign diplomacy. To be sure, a determination that a duly enacted statute unconstitutionally infringes on Executive authority must be “well-founded,” Memorandum for the Heads of Executive Departments and Agencies, Re: Presidential Signing Statements, 74 Fed. Reg. 10669 (2009); *see also* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200–01 (1994), and Congress quite clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration. As ample precedent demonstrates, however, Congress’s power to legislate in the foreign affairs area does not include the authority to attempt to dictate the modes and means by which the President engages in international diplomacy with foreign countries and through international fora. Section 7054 constitutes an attempt to exercise just such authority: It effectively denies the President the use of his preferred agents—representatives of the State Department—to participate in delegations to specified U.N. entities chaired or presided over by certain countries. As this Office has explained, such statutory restrictions are impermissible because the President’s constitutional authority to conduct diplomacy bars Congress from attempting to determine the “form and manner in which the United States . . . maintain[s] relations with foreign nations.” *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992) (citing *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 38 (1990)).

The President’s basic authority to conduct the Nation’s diplomatic relations derives from his specific constitutional authorities to “make Treaties,” to “appoint Ambassadors . . . and Consuls” (subject to Senate advice and consent), U.S. Const. art. II, § 2, cl. 2, and to “receive Ambassadors and other public Ministers,” *id.* art. II, 3. It also flows more generally from the President’s status as

Chief Executive, *id.* art. II, § 1, cl. 1 and from the requirement in article II, section 3 of the Constitution that the President “shall take care that the Laws be faithfully executed.” As a result of these authorities, it is well established that the President is “the constitutional representative of the United States in its dealings with foreign nations.” *United States v. Louisiana*, 363 U.S. 1, 35 (1960); *see also Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 235 (1839)(“As the executive magistrate of the country, [the President] is the only functionary intrusted with the foreign relations of the nation.”) . . .

In addition, the Executive Branch has long adhered to the view that Congress is limited in its authority to regulate the President’s conduct of diplomatic relations. . . .

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In more recent decades, the Executive has continued to object when Congress has attempted to impose limits on the form and manner by which the President exercises his diplomatic powers. In particular, the Executive has asserted on numerous occasions that the President possesses the “exclusive authority to determine the time, scope, and objectives” of international negotiations or discussions, including the authority “to determine the individuals who will” represent the United States in those diplomatic exchanges. And this Office has “repeatedly objected on constitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations,” including in the context of potential engagement with international fora. *See* Memorandum for Alan Kreczko, Legal Adviser, National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: WTO Dispute Settlement Review Commission Act* at 3 (Feb. 9, 1995) (“Dellinger WTO Memo”).

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Judicial support for the Executive Branch’s position can be found in *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). In that case, the United States Court of Appeals for the Ninth Circuit struck down a statute purporting to require the Secretary of State to initiate negotiations with, and otherwise engage, foreign governments for the purposes of developing and entering into international agreements for the protection of sea turtles. The court deemed the statute an unconstitutional “intru[sion] upon the conduct of foreign relations by the Executive.” *Id.* at 653. . .

That the President possesses the exclusive power to determine how to conduct diplomacy with other nations does not mean that Congress is without relevant authority. For example, the Senate must approve the treaties the President negotiates, *see* U.S. Const. art. II, § 2, cl. 2, and Congress can, by a subsequently enacted statute, limit the effect of treaties, *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that if a treaty and a statute are inconsistent, “the one last in date will control the other”). The Senate may even refuse its consent to a treaty if an international organization makes entry into such treaty a necessary precondition of United States participation in the proceedings of that organization. The statutory limitation at issue here, however, does not constitute such an exercise of Congress’s legitimate authority in the area of foreign affairs; rather, it purports to restrict the President from engaging in diplomacy through international fora that are organized pursuant to a treaty to which the United States is a party. *See* United Nations Charter, Jun. 26, 1945, 59 Stat. 1031, 1031, 1213 (noting that Senate consented to ratification of U.N. Charter on July 28, 1948). Section 7054, in other words, seeks to regulate who may participate in the delegations the President may send to the international fora of an organization to which the

United States belongs, and at which the United States would be received were its delegations to be sent.

Nor is the impact of section 7054 on the President's discretion to determine the "form and manner" of the Nation's diplomacy merely hypothetical. You have explained to us that "United Nations bodies and affiliated agencies are generally responsible for marshalling United Nations member state responses to issues that fall within their purview." State Request at 3. Accordingly, full U.S. participation in such bodies facilitates the type of direct diplomacy that is critically important to advancing U.S. objectives with respect to the issues under discussion. *Id.* at 4. . . . That Congress has purported to restrict the President's reliance on the State Department—the lead and most experienced and capable government agency with respect to U.N. relations, *see* 22 U.S.C. §§ 287, 298a (2006); *see also* State Request at 3–4—further heightens the extent to which section 7054 impermissibly restrains the President's authority. . . .

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B. CONSTITUTIONALITY OF STATE LEGISLATION CONCERNING FOREIGN AFFAIRS MATTERS

On April 14, 2009, the U.S. District Court for the Southern District of Florida granted summary judgment in a case challenging the constitutionality of amendments to a Florida statute imposing various requirements, including fees, on companies providing travel-related services to any country such as Cuba designated as a state sponsor of terrorism. *ABC Charters, Inc. v. Bronson*, 2009 U.S. Dist. LEXIS 31283 (S.D. Fla. 2009), 21 Fla. L. Weekly Fed. D. 653. The court held that the amendments violated the Supremacy Clause, the Foreign Commerce Clause, and the Interstate Commerce Clause of the U.S. Constitution, as well as the federal government's constitutional authority over foreign affairs, stating, "The State of Florida is not entitled to adopt a foreign policy under our Constitution or interfere with the exclusive prerogative of the United States to establish a carefully balanced approach to relations with foreign countries, including Cuba." *Id.* at *17 (footnote and emphasis omitted). In so holding, the court largely adopted the position of the United States, set forth in a Statement of Interest dated March 20, 2009. Excerpts follow from the court's order, providing additional background on the statutory amendments, summarizing the U.S. position, and setting forth the court's analysis (one footnote and most citations to other submissions omitted). The text of the U.S. Statement of Interest is available at www.state.gov/s/l/c8183.htm. For discussion of U.S. sanctions concerning Cuba, see Chapter 16.B. and C.

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. . . Plaintiffs advanced a facial challenge to the constitutionality of the amendments to the Florida Sellers of Travel Act, Fla. Stat. § 559.926 *et seq.*, enacted as SB 1310 ("An Act Relating to Sellers

of Travel”) effective July 1, 2008 (“Travel Act Amendments”) Plaintiffs are travel agencies and charter companies providing services to individuals traveling to Cuba or who wish to send humanitarian aid or family remittances to Cuba. The Travel Act Amendments, among other things, (1) require companies providing lawful travel related services to Cuba to post a bond in an amount of \$100,000 or \$250,000 while requiring those companies not offering travel to Cuba or other “terrorist states” to post a bond of \$25,000; (2) allow the Defendant to use the bond to pay its own investigatory expenses without any limits to the exposure under the bond and prioritize the payment of the bond funds to the state over compensation to consumers; (3) permit the imposition of higher registration fees and fines on travel providers offering travel to Cuba; (4) automatically make any violation of federal law by Plaintiff a third-degree felony under Florida law; and (5) require disclosure and identification by Plaintiffs of each company with whom each Plaintiff does any Cuba-related business or commerce, and make that information publicly available.

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. . . . In my Preliminary Injunction Order, I concluded that (1) the Travel Act Amendments are designed and structured to end or seriously hamper federally licensed travel from Florida to Cuba, and that such a law is more than just a state consumer protection decision but also a political statement of condemnation of Cuba; (2) the significant burdens on travel and charter service providers impair the ability of this Nation to choose between a range of policy options in developing its foreign relations with Cuba; (3) the Airline Deregulation Act, which extends to indirect air carriers such as Plaintiffs, expressly preempts the Travel Act Amendments because they would have a significant effect on rates, routes or services; (4) the Travel Act Amendments conflict with, and are therefore preempted by, federal laws and regulations including the Trading with the Enemy Act and the Office of Foreign Assets Control’s (“OFAC”) Cuba Asset Control Regulations; (5) federal laws and regulations occupy the field as to regulation interactions and transactions with Cuba by persons and businesses in the United States; (6) the Travel Act Amendments impermissibly discriminate against the flow of foreign commerce and regulate conduct outside the borders of the United States; and (7) under the interstate commerce clause, the extensive web of federal laws regulating business with and travel to Cuba displaces state laws such as the Travel Act Amendments.

The United States is in substantial agreement with these conclusions. According to its Statement of Interest, the State of Florida enacted the Travel Amendments “in an attempt to conduct its own foreign policy,” and “the very existence of the legislation . . . impairs the federal government’s ability to present a single, unified foreign policy on behalf of the United States when dealing with other countries.”

The United States Constitution vests exclusive authority for the conduct of foreign relations in a single, national government. This structure ensures that the United States is able to speak with one voice when managing relations with other nations. Pursuant to its constitutional authority, Congress has enacted numerous federal statutes pertaining to relations with the countries that the Executive Branch designates as state sponsors of terrorism. Some of these federal statutes mandate aspects of the sanctions imposed on the designated states, while others give the Executive Branch broad authority and flexible tools to regulate transactions with these countries. Congress specifically has addressed travel to the designated states under current sanctions regimes. With regard to Cuba, Congress has passed several

laws governing permitted travel, while leaving the Executive Branch discretion to adjust many aspects of the travel regulations as circumstances dictate The Executive Branch has in turn promulgated comprehensive regulations governing . . . travel to Cuba. These regulations are designed to balance multiple, competing foreign policy considerations and achieve important, often changing, foreign policy objectives.

[U.S. Statement of Interest, at 1–2.] The United States argues that the Travel Act Amendments interfere with the exercise of this “exclusive” and “broad” authority. Specifically, federal regulations impose significant restrictions on travel to Cuba, but permit travel to Cuba in instances that promote the goal of a “peaceful transition to democracy” in that country or serve other foreign policy interests. By imposing significant burdens, beyond those already imposed under federal law, on entities that provide travel services to Cuba, the Florida Amendments will limit travel that the federal government has deemed consistent with U.S. foreign policy objectives. Further, the Travel Act Amendments “interfere with federal determinations about the appropriate type of penalties to impose when violations of federal law occur.” By allowing Florida to impose its own penalties for the violation of federal laws relating to commerce with designated states, the Florida Amendments undermine the federal government’s “calibration of force” and its judgment about the best way to enforce sanctions to achieve U.S. foreign policy objectives.

. . . [R]ecent developments further indicate our nation’s changing foreign policy objectives with respect to Cuba, further counseling against permitting the Travel Act Amendments from going into effect. I take judicial notice that OFAC has recently issued, in response to the Omnibus Appropriations Act, 2009, a general license permitting an expanded range of family travel to permit visiting close relatives in Cuba from once every three years to once every year. *General License for Visits to Close Relatives in Cuba*, OFAC Cuban Assets Control Regulations, Mar. 11, 2009.⁵ . . . President Barack Obama announced on April 13, 2009 that the restrictions on family travel, and remittances and gifts to Cuba will be lifted and Cuban Americans will now be permitted to travel freely to the island and send as much money as they want to their family members, in a marked reversal of the United States’ prior policy. . . . Such changes in foreign policy with respect to Cuba further demonstrate that the Travel Act Amendments interfere with this country’s foreign policy objectives. As the United States represented at oral argument, these recent changes aptly demonstrate that the Travel Act Amendments would undermine the power of the federal government to act on behalf of the entire nation with respect to our relations with Cuba.

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C. INTERLOCUTORY APPEALS PREDICATED UPON FOREIGN RELATIONS IMPACT

On November 30, 2009, at the request of the U.S. Court of Appeals for the Second Circuit, the United States filed a brief as *amicus curiae* arguing that the court did not have jurisdiction over an interlocutory appeal. *In re S.*

⁵ Available at http://www.treas.gov/offices/enforcement/ofac/programs/cuba/gl_omni2009.pdf (last visited April 13, 2009); *see also* 69 Fed. Reg. 33775 (Jun. 16, 2004).

African Apartheid Litig., 09–2778–cv (2d Cir.). The defendants sought review of a district court’s order in long–running litigation alleging that several multinational companies aided and abetted human rights abuses in apartheid–era South Africa. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). The district court dismissed some defendants and some claims, including certain aiding and abetting claims for failure to satisfy the court’s standard for such liability under the Alien Tort Claims Act (“ATCA”), 28 U.S.C. § 1350. The court permitted other aiding and abetting claims to proceed and declined to dismiss the suits entirely based on political question and international comity concerns as the defendants requested. *Id.* at 265–66, 269, 276, 283–84, 285–86, 286 n.259. The defendants sought appellate review of the district court’s order, arguing in part that the decision came within the collateral order doctrine because of its effect on the United States’ foreign relations. For discussion of prior developments in the litigation, see *Digest 2004* at 354–61, *Digest 2005* at 400–11, *Digest 2007* at 226–27, and *Digest 2008* at 236–38. The *amicus curiae* brief the United States filed in the Second Circuit on October 15, 2005, is available as document 34 for *Digest 2005* at www.state.gov/s/l/c8183.htm.

Excerpts below from the brief the United States filed on November 30, 2009, explain the government’s view that, consistent with the limits on the collateral order doctrine, “an explicit request for dismissal from the United States (as opposed to a request from a private party or another country) is a necessary condition for collateral order appeal in this context.” (Footnotes and citations to the parties’ filings are omitted.) The full text of the U.S. *amicus* brief is available at www.state.gov/s/l/c8183.htm. The litigation remained pending at the end of 2009.

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If an order is not a “final decision” of a district court (28 U.S.C. § 1291) and if the courts have not authorized interlocutory appeal (*see* 28 U.S.C. § 1292(b)), a party generally may not obtain appellate review of the order until the conclusion of the suit in the district court. But appellate jurisdiction under Section 1291 encompasses “a narrow class of decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final.” *Will v. Hallock*, 546 U.S. 345, 347 (2006) (quotation marks omitted). To qualify as a collateral order that is subject to immediate appeal, the order must “[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *Id.* at 349 (quotation marks omitted). With regard to the third criterion, the Supreme Court explained that it is principally orders that would impair a right to avoid trial that are effectively unreviewable on appeal from a final judgment. *Id.* at 350–51. But not even all such orders satisfy the third criterion: “[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is ‘effectively’ unreviewable if review is to be left until later.” *Id.* at 353.

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As suggested by the United States’ Supreme Court filing in *Exxon Mobil*, we believe that an explicit request for dismissal from the United States (as opposed to a request from a private party or another country) is a necessary condition for collateral order appeal in this context. [Editor’s note: *Digest 2008* discusses the U.S. *amicus curiae* brief in *Exxon Mobil v. Doe*, No. 07-81 (S. Ct. 2008) at 223–27.] That requirement respects the separation of powers under the Constitution and the primary responsibility of the Executive Branch in the conduct of the Nation’s foreign affairs. Requiring an explicit request for dismissal by the United States ensures that the Executive Branch has determined that continued adjudication of the particular case will cause a separation-of-powers injury of a magnitude sufficient to merit immediate appeal, should the district court deny defendants’ motion to dismiss. This rule thus furthers the ability of the United States to speak with one voice on such matters. And as plaintiffs here note, the requirement also provides litigants and the courts with a bright-line rule, making it relatively easy to determine when the requirements for collateral order appeal are satisfied and avoiding disputes about whether the United States’ statement “necessarily implies that the case should be dismissed”.

As with the statement of interest in *Exxon Mobil*, the statement of interest and appellate filings the United States submitted in this case did not *explicitly* ask that the suits be dismissed because of their impact on the United States’ foreign policy. . . . Indeed, as the district court here recognized, the Government’s statement of interest in this case principally expressed reservation about this suit “[t]o the extent that” the litigation might impair the United States’ foreign relations and its ability to use economic engagement as a foreign policy tool. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 276 (quoting [Letter from William H. Taft IV, Legal Adviser, to Shannen W. Coffin, Deputy Assistant Attorney General (Oct. 27, 2003), at 2]) (emphasis omitted). The United States’ previous filings in this case undoubtedly expressed concern about the impact this case would have on the United States’ foreign policy and foreign relations. *See, e.g.*, [Brief for the United States as Amicus Curiae In Support of Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2008), at 5]. But . . . [a]t no time has the United States informed the courts that the foreign policy consequences of this litigation are so grave as to call for dismissal on that basis, even if the suit were otherwise proper as a substantive matter, and the United States does not make that representation now. The fact that the United States did not explicitly request that the case be dismissed predicated on the suit’s impact on foreign policy, and that the district court did not deny defendants’ motion to dismiss despite such a request, means that the district court’s order does not satisfy the third prong of the collateral order doctrine under the standards articulated in the United States’ *Exxon Mobil* brief.

Also like *Exxon Mobil*, this suit has significantly changed over the course of the litigation. Although Germany and some other countries continue to raise concerns, most of the defendants have been dismissed voluntarily by plaintiffs, others have been dismissed by the district court, and the claims against the remaining defendants have been narrowed. . . .

The United States previously informed the courts that, in light of South Africa’s strong objections, “continued adjudication of [these suits] risks potentially serious adverse consequences for significant interests of the United States.” Letter from Taft to Coffin 2. However, the South African Justice Minister recently informed the district court that, by dismissing claims based solely on doing business with the apartheid regime, the district court “addressed some of the concerns which the Government of the Republic of South Africa had.” [Letter from J.T. Radebe, Minister of Justice and Constitutional Development, to Hon. Judge Shira A. Scheindlin, U.S. District Court, Southern District of New York (Sept. 1, 2009), at 2]. The Justice Minister further reported that

“[t]he Government of the Republic of South Africa, having considered carefully the judgement of the United States District Court, Southern District of New York is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.” *Ibid.* The United States takes at face value these formal statements from a high-level South African government official.

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The United States also stated in part that “the district court’s denial of defendants’ motion to dismiss on international comity grounds does not provide a basis for this court’s interlocutory review.” The United States explained that

orders denying motions to dismiss on international comity grounds are ordinarily not subject to collateral order appeal. *See Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 843 (5th Cir. 1986). And the approach the United States proposed in its *Exxon Mobil* Supreme Court filing turns on the separation-of-powers harm that would follow from denial of immediate appellate review of a district court order denying a motion to dismiss in a case in which the United States explicitly informed the district court that the case-specific injury to the Nation’s foreign policy interests was a sufficient basis for dismissal. In the absence of such an express request for dismissal by the United States, it is our view that a foreign government’s policy interests do not implicate the separation of powers in a manner that triggers an immediate right of review under the collateral order doctrine under the United States’ *Exxon Mobil* approach. . . .

D. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act (“ATCA”), also referred to as the Alien Tort Statute (“ATS”), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been relied upon by plaintiffs and interpreted by the federal

courts in various cases raising claims under international law. In 2004 the Supreme Court held that the ATCA is “in terms only jurisdictional” but that, in enacting the ATCA in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* brief filed in the Second Circuit in *Filartiga v. Pena-Irala*, the United States described the ATCA as one avenue through which “an individual’s fundamental human rights [can be] in certain situations directly enforceable in domestic courts.” Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals regardless of nationality, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains a ten-year statute of limitations.

The following item represents one relevant development during 2009 in litigation in which the United States had provided its views previously.

2. Aiding and Abetting: *Presbyterian Church of Sudan v. Talisman Energy, Inc.*

On October 2, 2009, as amended on November 9, 2009, the U.S. Court of Appeals for the Second Circuit affirmed a lower court’s grant of summary judgment to a Canadian energy company, Talisman Energy, Inc. (“Talisman”), the defendant in a suit that nationals of Sudan brought under the ATCA, alleging that Talisman aided and abetted and conspired with the Government of Sudan in committing international law violations. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). For prior developments in the case, see *Digest 2003* at 383-84; *Digest 2005* at 394-400 and 822-23; and *Digest 2006* at 460-65.

In its 2009 judgment, the Second Circuit followed the holding in *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007), that in the Second Circuit, “a plaintiff may plead a theory of aiding and abetting liability” under the ATCA. *Presbyterian Church of Sudan*, 582 F.3d at 258. Noting that *Khulumani* did not establish a standard for imposing aiding and abetting liability, the court looked to international law to define that standard. The court concluded that “under international law, a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses,” and therefore “the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.” *Id.* at 247, 259. The court applied that standard in

affirming the district court, stating that that “plaintiffs have presented no evidence that Talisman acted with the purpose of harming civilians living in southern Sudan.” *Id.* at 247–48.*

In so holding, the Second Circuit disagreed with views the United States had presented in an *amicus curiae* brief filed in the case on May 15, 2007. The U.S. brief is available at www.state.gov/s/l/c8183.htm.

Cross References

Secretary of State discretionary role in citizenship and passport issues,
Chapter 1.A.2.

Comity issues in litigation in U.S. courts, **Chapters 4.C.1. and 15.C.1., 2.b., and 3.b.**

Cases presenting non-justiciable political questions, **Chapter 9.B. and C.**
Pre-emption of state and local laws, **Chapter 10.C.1.**

* Editor’s note: The plaintiffs-appellants filed a petition for a writ of certiorari in the U.S. Supreme Court on April 15, 2010, and Talisman filed a petition for a writ of certiorari in the U.S. Supreme Court on May 20, 2010.